



[Billing Code: 4710-24]

DEPARTMENT OF STATE

48 CFR Parts 645 and 652

RIN 1400-AC33

[Public Notice 8546]

Department of State Acquisition Regulation

AGENCY: Department of State

ACTION: Final rule.

SUMMARY: This rule adopts as final certain changes proposed to the Department of State Acquisition Regulation (DOSAR) to conform to Federal Acquisition Regulation (FAR) changes. It adds a new DOSAR clause and provision regarding reporting certain categories of Government-furnished and contractor-acquired property.

DATES: This rule is effective on *[insert date 30 days from date of publication in the Federal Register]*.

FOR FURTHER INFORMATION CONTACT: You may obtain copies of the proposed information collection and supporting documents from Ella Ramirez, Senior Procurement Analyst, Policy Division, Department of State, Office of the Procurement Executive, 2201 C Street, NW, Suite 1060, State Annex Number 15, Washington, DC 20522-0602; e-mail address: RamirezIM2@state.gov.

SUPPLEMENTARY INFORMATION:

This rule was published as a Notice of Proposed Rulemaking (NPRM) on July 29, 2013 (78 FR 45490), with a provision of 60 days for public comment. A summary of the proposed changes and the reasons therefor were included in the NPRM. The Department of State (Department) received two comments in response to the NPRM.

The first commenter recommended that requirements for accountability for Government-provided software be deleted because FAR Part 27 covers software and FAR Part 45 does not. While it is true that software is expressly excluded from the FAR 45.101 definition of “Government property,” tracking of software provided by the Department to its contractors is required information for the Department’s financial statement. Prescribing separate reporting of this information in a DOSAR supplement to FAR 27 would be burdensome and inefficient. Accordingly, that recommendation is not accepted.

The first commenter also recommended that “Accounting” be changed to “Accountability” in the proposed DOSAR §§652.245-70(a)(3) and 652.245-71, on the theory that Part 45 governs the management and accountability of Government-owned property, not “accounting,” which is a financial function. The Department accepts this recommendation insofar as the language in the provision, and has changed the title of the clause to “Special Reports of Government Property.”

The first commenter pointed out duplicate provisions in proposed § 652.245-71(d)(2)(iv) and (d)(2)(xiv). The Department agrees that these provisions are duplicative, and will delete subsection (d)(2)(xiv), renumber subsequent provisions, and move the parenthetical comment (“If from another DOS contract, or government agency, please specify”) to subsection (d)(2)(iv).

The first commenter recommended that the words “or their delegated representatives” be added to the end of the chapeau to §652.245-71(f). The Department does not agree that delegating this responsibility would be appropriate, and does not accept this recommendation.

The second commenter advances several broad arguments involving the Department’s authority to enact rules and to make findings with respect to various administrative laws and executive orders that apply to rulemaking. The Department disagrees with the comments.

The authority of agencies to regulate is well-established. The absolute “non-delegation” concept has been virtually abandoned since 1948. *See Mistretta v. United States*, 488 U.S. 361 (1989), and the cases cited therein. “The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.” *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.” *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-844 (1984) (footnote omitted).

In the case of the FAR and DOSAR, Congress explicitly delegated rulemaking authority to certain agencies, resulting in the FAR. 41 U.S.C. 1303. FAR 1.301 provides authority to

agencies to supplement the FAR: “[A]n agency head may issue or authorize the issuance of agency acquisition regulations that implement or supplement the FAR and incorporate, together with the FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency, including any of its suborganizations, and contractors or prospective contractors.” 48 CFR §1.301. The Secretary of State has the general authority to issue regulations to carry out the functions of the Department; specifically, in this case, regulations to implement procurement statutes and the FAR. 22 U.S.C. §2651a. The Department of State’s implementing regulations are the DOSAR, codified at 48 CFR Parts 600-699.

The commenter further challenged the ability of a Department official to make findings with respect to compliance with applicable statutes and executive orders (contained in the “Regulatory Findings” section of the NPRM and in this Final Rule, below). Except for the Administrative Procedure Act (APA), the statutes or executive orders cited in this section require agencies to consider certain factors prior to publishing a rule. (With respect to the APA, the Department’s assertion was (and is) a simple statement of fact regarding how it has complied with that law.)

If a member of the public has information contrary to the assertion of the Department official (for example, proof that annual impact on the U.S. economy from the rulemaking would in fact exceed \$100,000,000; or proof that the rule would have a significant impact on domestic tribes), he or she could present such information during the comment period, at which time the Department would have to address it. The commenter did not present such evidence; nor did she cite any authority for the proposition that the Department is not permitted to assert its compliance with statutes and executive orders.

CONCLUSION

The rule published as part of the NPRM is hereby published in final, with the modifications described above.

REGULATORY FINDINGS

Administrative Procedure Act

In accordance with provisions of the Administrative Procedure Act, the Department published this rule and provided 60 days for public comment.

Regulatory Flexibility Act

The Department of State, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This determination was based on the fact that the reporting requirements are targeted at a very narrow segment of government property and based on a determination that there are only 14 contractors who are currently subject to the reporting requirements of the clause. Only four of these are small business concerns. Thus, it was concluded that the rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by the Small Business Regulatory Enforcement Act of 1996 (5 U.S.C. 801 et seq.). This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and import markets. This determination was based on the fact that the reporting requirements are targeted at a very narrow segment of government property, and on a determination that there are only 14 contractors who are currently subject to the reporting requirements of the clause. The rule does not place new requirements on contract performance, but merely addresses reporting of existing information.

Executive Orders 12866 and 13563

Executive Orders (E.O.) 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). E.O. 13563 emphasized the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting

flexibility. The Department of State does not consider this rule to be a “significant regulatory action” under Executive Order 12866, section 3(f), Regulatory Planning and Review.

In addition, the Department is exempt from Executive Order 12866 except to the extent that it is promulgating regulations in conjunction with a domestic agency that are significant regulatory actions. The Department has nevertheless reviewed the regulation to ensure its consistency with the regulatory philosophy and principles set forth in the Executive Orders and finds that the benefits of the proposed rule outweigh any costs.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement.

Executive Order 13175

The Department has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not pre-empt tribal law. Accordingly, the requirements of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

The Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35) applies, because the proposed rule imposes information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

SUMMARY OF PROPOSED COLLECTIONS: The Department of State is seeking OMB approval for the information collection described below.

- *Title of Information Collection:* Department of State Acquisition Regulation (DOSAR) 652.245-70, Status of Property Management System
- *OMB Control Number:* 1405-0050
- *Type of Request:* Revision of Currently Approved Collection
- *Originating Office:* Bureau of Administration, Office of Procurement Executive, Policy Division (A/OPE/PD)
- *Form Number:* None

- *Respondents:* Business and other for-profit and not-for-profit organizations wishing to receive Department of State contracts.
- *Estimated Number of Total Respondents:* 3,466
- *Estimated Number of Total Responses:* 9,330
- *Average Time Per Response:* 30 hours
- *Total Estimated Burden Time:* 275,984
- *Frequency:* On Occasion
- *Obligation to Respond:* Required to Obtain or Retain a Benefit

The total number of responses was increased by fourteen from 9,316 to 9,330. As a result of this change, the total estimated burden was increased from 275,970 hours to 275,984 hours. The increase in the responses and the burden is due to the impact of this DOSAR provision.

Abstract of proposed collection:

The proposed rule will update the Department of State Acquisition Regulation (DOSAR) to conform to recent Federal Acquisition Regulation (FAR) changes, and adds a new DOSAR provision, 652.245-70, regarding reporting on the status of offeror's property management systems. Respondents are offerors on solicitations for contracts under which specified government property will be provided. This is an existing IC, 1405-0050, Department of State Acquisition Regulation (DOSAR) 652.245-70, Status of Property Management System. This provision was inadvertently left out of the previously approved Information Collection package. The new provision is being inserted into the DOSAR and concurrently added into the current IC. The new DOSAR provision (and IC requirement) asks for procedures for government property management (transportation, software, personal property). Over the course of the last two fiscal years (FY 11 and FY 12), only four solicitations were issued under which this new reporting was required, and on those solicitations, an average of 2.3 submissions was received. Based on conversations with a sample of submitters, we estimate that approximately 1.0 hour is required to research, document and incorporate the information into the proposal.

The Department received two comments in response to the NPRM, but neither comment addressed the information collection specifically.

Legal Authorities are as follows:

- 1) Code of Federal Regulations, Title 48, Chapter 6, Department of State Acquisition Regulation
- 2) Code of Federal Regulations, Title 48, Chapter 1, Federal Acquisition Regulation

- 3) Public Law 103-236, Foreign Relations Authorization Act, Fiscal Years 1994 and 1995
- 4) Foreign Service Buildings Act of 1926, as amended (22 U.S.C. 302)
- 5) Omnibus Diplomatic Security and Antiterrorism Act of 1986 (22 U.S.C. 4852)
- 6) Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (22 U.S.C. 4864)

List of Subjects in 48 CFR Parts 645 and 652

Contracts, Electronic commerce, Government procurement.

Accordingly, for reasons set forth in the preamble, Title 48, chapter 6 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 645 reads as follows:

Authority: 40 U.S.C. 121; 22 U.S.C. 2651a; 48 CFR Subpart 1.3

2. Part 645 is revised to read as follows:

PART 645 – GOVERNMENT PROPERTY

Subpart 645.1 – General

Sec.

645.107 Contract clauses.

645.107-70 DOSAR contract clause and solicitation provision.

(a) The contracting officer shall insert the provision at 652.245-70, Status of Property Management System, in solicitations when any of the following conditions apply:

- (1) Highway motor vehicles and aircraft, regardless of cost, are provided by the Government or acquired by the contractor for the account of the Government;
- (2) Software exceeding \$500,000 in value, including labor costs to develop, is provided by the Government or acquired by the contractor for the account of the Government; or
- (3) Personal property greater than \$25,000 (and not in paragraphs (a)(1) or (2) of this subsection) is provided by the Government or acquired by the contractor for the account of the Government. The personal property must be complete within itself; does not lose its identity or become a component part of other property when put into use; and is of a durable nature with an estimated useful life expectancy to exceed two years.

(b) The contracting officer shall insert the clause at 652.245-71, Special Reports of Government Property, in all solicitations and contracts that contain the provision at 652.245-70.

PART 652 – SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. The authority citation for part 652 is revised to read as follows:

Authority: 40 U.S.C. 121; 22 U.S.C. 2651a; 48 CFR Subpart 1.3

4. Section 652.245-70 is added to read as follows:

652.245-70 Status of Property Management System.

As prescribed in 645.107-70(a), insert the following provision:

Status of Property Management System (DEC 2013)

(a) When used in this provision, government-furnished property, government property, and contractor-acquired property are as defined in FAR 45.101.

(b) Offerors shall include in their quote or offer:

(1) Whether the offeror's property management system that will be used on this contract to track government-furnished property and/or contractor-acquired property has been determined to be adequate by a Federal property manager;

(2) The name, address, telephone number and e-mail address of both the –

(i) Cognizant Administrative Contracting Officer (ACO) responsible for review and determination of adequacy of the contractor's property system; and

(ii) The cognizant contractor government property manager;

(3) The voluntary consensus standard or industry leading practices and standards to be used in the management of government property, or existing property management plans, methods, practices or procedures for accountability of property.

(End of provision)

5. Section 652.245-71 is added to read as follows:

652.245-71 Special Reports of Government Property.

As prescribed in 645.107-70(b), insert the following clause:

Special Reports of Government Property (DEC 2013)

(a) *Definitions.* As used in this clause:

Disposition means government property that has been removed from use on the contract.

Highway motor vehicle means any vehicle, self propelled or drawn by mechanical power, designed and operated principally for highway transportation of property or passengers. (41 CFR 102-34.35).

(b) The Contractor shall establish and maintain a property management system that is in accordance with the clause at FAR 52.245-1, Government Property. This clause supplements

these requirements by specifying the U.S. Department of State capitalized property reporting requirements.

(c) The Contractor shall submit electronically one report on an annual basis and three other reports on a quarterly basis for the following:

(1) Where highway motor vehicles and aircraft, regardless of cost, are provided by the Government or acquired by the Contractor for the account of the Government;

(2) Where software exceeding \$500,000 in value, including labor cost to develop, is provided by the Government or acquired by the Contractor for the account of the Government; or

(3) Where personal property greater than \$25,000 (not in paragraph (c)(1) or (c)(2) of this clause) is provided by the Government or acquired by the Contractor for the account of the Government. The personal property must be complete within itself; does not lose its identity or become a component part of other property when put into use; and is of a durable nature with an estimated useful life expectancy to exceed two years.

(d) The Contractor shall submit all annual and quarterly reports in the following format, except as stated in paragraph (e) of this clause:

(1) Property shall be grouped by the following property classifications:

- (i) Highway motor vehicles;
- (ii) Communications equipment;
- (iii) Information technology (formerly called automated data processing) equipment;
- (iv) Reproduction equipment;
- (v) Security equipment;
- (vi) Software;
- (vii) Software-in-development;
- (viii) Medical equipment;
- (ix) Aircraft property; and
- (x) Other depreciable personal property.

(2) Data elements for each unit of property shall include:

- (i) Contract number: Federal Government contract or purchase order number;
- (ii) Task Order number;
- (iii) Property classification: From classification listed in paragraph (d)(1) of this clause;

(iv) Denotation as either government-furnished property (GFP) or contractor-acquired property (CAP) (If from another DOS contract, or government agency, please specify).

(v) Noun name of property (i.e. generator);

(vi) Description of property;

(vii) Manufacturer;

(viii) Model;

(ix) Serial number;

(x) National Stock Number if applicable

(xi) Unique-item identifier or equivalent: such as barcode label (tag number) or system-assigned number. For highway motor vehicles, this must be the vehicle identification number (VIN);

(xii) Date received: Date contractor took possession;

(xiii) Date placed in service;

(xiv) Acquisition cost (As defined in FAR clause 52.245-1(a)): Use estimated fair-market value for property transferred or donated, at the time acquired, if actual cost is unknown;

(xv) Estimated useful life in years: The period during which the property is expected to provide the service for which it was intended. This should normally be equivalent to the depreciation schedule;

(xvi) Current location of the property: Country and city;

(xvii) Disposal Date;

(xviii) Disposal Method;

(e) The Contractor shall submit a full property report, as described in this clause, including affirmation, for the report covering the first quarter of the base contract. Thereafter, submission of reports shall follow the time frames outlined in paragraph (h) below. Quarterly property reports, other than the annual report, may be either full property reports or only updates to the full property report. Quarterly reports do not require affirmations even when the Contractor chooses to submit a full property report. Affirmations are only required for the report covering the first quarter of the contract and the annual report for each subsequent option year of the contract. If the Contractor submits a full property report, dispositions subsequent to any previous

report must also be identified in the report. If a Contractor submits a quarterly report in the form of an update, the update shall include acquisitions and dispositions.

(f) The Contractor shall provide any required affirmation in the following format. The affirmation shall be signed by the Contractor's managerial personnel (as defined in FAR clause 52.245-1):

"I hereby affirm that a physical inventory of the government property (as defined in Federal Acquisition Regulation (FAR) 45.101) of Department of State contract number (*insert contract number*) has been completed as of (*insert date*), the inventory has been reconciled to our records and the property information in our report, and that to the best of my knowledge and belief, this inventory is accurate, current, and complete.

Signed: _____

Printed: _____

Title: _____

Date: _____"

(g) In addition to the information required above, the Contractor shall include in all property reports:

(1) The current degree to which properly qualified Government personnel have evaluated the Contractor's property management system as being an adequate property management system;

(2) The name, mailing address, telephone number, and e-mail address of the qualified Government person(s) who performed the evaluation of the Contractor's property management system; and

(3) The cognizant contractor government property manager.

(h) Reports shall cover the following time periods and are due on the following dates:

Report	Period Covered	Due Date
1 st Quarter Report	For 1 st quarter ending December 31	January 15
2 nd Quarter Report (Annual Property Report)	For 2 nd quarter ending March 31	April 30
3 rd Quarter Report	For 3 rd quarter ending June 30	July 15
4 th Quarter Report	For 4 th quarter ending September 30	October 8

(i) The Contractor shall send a copy of all reports to the individuals listed below. The Contractor shall submit reports in electronic format as an attachment to an e-mail. The affirmation described in paragraph (f) of this clause shall be in Adobe Acrobat (.pdf) format (including the signature), while the inventories, both quarterly and annual, shall be in Microsoft Excel format (Adobe Acrobat and Microsoft Excel versions shall be compatible with versions used by DOS). Send all reports to:

- (1) The contracting officer;
- (2) The Property Administrator;
- (3) The contracting officer's representative (COR);
- (4) Propertyreports@state.gov;
- (5) RM-FPRA-PROP@state.gov; and
- (6) All individuals listed below (if any):

[contracting officer shall list individuals, if any].

(j) The Contractor shall cooperate by responding timely to all follow up questions and requests for supporting documentation whether requested by the Department or external auditors.

(End of clause)

Dated: November 26, 2013.

Corey M. Rindner
Procurement Executive
Department of State

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